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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MACKAY RADIO & TELEGRAPH COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered on October 19, 1937 (R. 124), denying the petition of the National Labor Relations Board for the enforcement of its order against Mackay Radio & Telegraph Company, made pursuant to the National Labor Relations Act.

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R.

17–48) are reported in 1 N. L. R. B. 201. The opinions of the Circuit Court of Appeals on the original hearing (R. 62–104) are reported in 87 F. (2d) 611. The opinions on rehearing (R. 113–123) are reported in 92 F. (2d) 761.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 19, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether men on strike because of failure of negotiations concerning wages and terms of employment are employees, within the meaning of the National Labor Relations Act.

2. Whether it is an unfair labor practice, forbidden by the National Labor Relations Act, for an employer to discriminate because of union activities in the reinstatement of employees who have gone on strike because of failure of negotiations concerning wages and terms of employment, and whether the Act authorizes the National Labor Relations Board to order the reinstatement of employees so discriminated against.

3. Whether the National Labor Relations Act, construed so as to authorize the Board to require the reinstatement of such persons, violates the Fifth Amendment.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Sup. II, Title 29, Sec. 151 *et seq.*) are as follows:

> SEC. 2. When used in this Act—
>
> (3) The term "employee" shall include * * * any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *
>
> (9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment * * *
>
> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.
>
> (3) By discrimination in regard to hire or tenure of employment or any term or con-

dition of employment to encourage or discourage membership in any labor organization: * * *

SEC. 10.

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

STATEMENT

Pursuant to Section 10 (b) of the National Labor Relations Act, the National Labor Relations Board, on November 9, 1935, issued a complaint and notice of hearing, which were duly served upon respondent (R. 2–5). The complaint, insofar as material here, alleged that respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1) and (3) of the Act (R. 3–4). A hearing was held from December 2 to December 20, 1935, before a Trial Examiner designated by the Board. Oral argument was held before the Board at Washington, D. C., on January 20, 1936, and respondent filed a brief in support of its position. Thereafter, on February 20, 1936, the

Board issued its findings of fact, conclusions of law and order (R. 17–48).

The Board found, in substance, that respondent operated a system for the receipt and transmission by telegraph, radio, and cable of communications in interstate and foreign commerce (R. 18–19). Beginning in June, 1935, the American Radio Telegraphists Association (the ARTA) attempted to negotiate general agreements with respondent concerning the wages and working conditions of its radio operators (R. 20). After these negotiations had continued for several months without success, the San Francisco local of the ARTA, to which the men here involved belonged, authorized the national officers conducting the negotiations to call a strike if the respondent did not execute the agreements by September 23, 1935 (R. 20–21). Pursuant to this authorization and because of the unsatisfactory state of the negotiations, a strike was finally called by the negotiators on October 4, 1935 (R. 21). The strike was unsuccessful, and by October 7 the men were willing to return to work (R. 21–24). The officials of the company agreed to let all the men return at once, except those on a list of 11 who were required to apply to the central office for reinstatement (R. 23). The company's claim was that it had brought 11 men to San Francisco during the strike, and that they were entitled to permanent jobs there (R. 28–29). The 11 men not immediately reinstated included five who were

admittedly inefficient (R. 33–34), a supervisor who was also a member of the union (R. 27–28), and five men who were among the best of the company's operators but who were also the leaders of the San Francisco local of the ARTA (R. 28, 34). The company refused to reinstate any of the five men last mentioned (R. 24, 27)[1] (although all except one of the inefficient employees were taken back) (R. 24, 30, 32, 33–36). The Board found that four of these five employees had been refused reinstatement in order to discourage membership in the ARTA, and that this conduct on the part of respondent constituted discrimination in regard to tenure of employment in violation of Section 8, subdivisions (1) and (3) of the Act (R. 36, 46–47). In addition the Board found that another employee, Phelps, who was not on the original list of 11, was refused reinstatement because of his membership in ARTA, and that this action also violated the same provisions of the Act (R. 36–39, 46–47).

Upon the basis of these findings, the Board ordered respondent to cease and desist from discharging or threatening to discharge any of its employees because they joined or assisted the union or otherwise engaged in union activities; and from in any manner interfering with, restraining or coercing its employees in the exercise of their rights to self-organization and collective bargain-

[1] Palmer, Rone, Bash, Loudermilk, and Salisbury. No complaint was made as to Salisbury (R. 2–4).

ing (R. 47). The Board's order further required respondent to offer full reinstatement, with back pay, to the five employees unlawfully discriminated against, and to post appropriate notices (R. 47–48).

In March 1936 the Board, pursuant to Section 10 (e) of the Act, petitioned the Circuit Court of Appeals for the Ninth Circuit for enforcement of the foregoing order (R. 51–54). On January 11, 1937, the court first denied the Board's application (R. 104). Three opinions were handed down (R. 62–104).

Circuit Judge Wilbur held that although "the Board was acting well within the power Congress sought to vest in it" (R. 86, 83–84) in ordering the reinstatement of the five employees, the grant of power violated the due process clause as interpreted in *Adair* v. *United States,* 208 U. S. 161, and *Coppage* v. *Kansas,* 236 U. S. 1 (R. 82–84). He also held that, insofar as the Act authorized the award of back pay without jury trial, it contravened the Seventh Amendment (R. 89).

Circuit Judge Mathews, concurring with Judge Wilbur in result, found it unnecessary to pass upon the constitutional question (R. 89). His position was that the statute defined employees as including "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute," and that there was no evidence or finding that the strike in this case was a "cur-

rent labor dispute" (R. 90). He accordingly concluded that the men on strike were not employees within the meaning of the Act, and that the conduct of respondent toward them could not violate the Act (R. 91). Although he recognized that the Board had found that the strike had been called because of the unsatisfactory state of the negotiations (R. 90), he appears to have construed the phrase "current labor dispute," as used in the statute, as not including such a strike.

Circuit Judge Garrecht dissented (R. 92–104). He agreed with Judge Wilbur that the Board's action was clearly authorized by the statute, but held that the Act did not in any way violate the Constitution, and that the order should be enforced.

After the decisions of this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and companion cases, holding that the Act did not violate the Fifth and Seventh Amendments, the Circuit Court of Appeals granted a rehearing. Judge Wilbur, who had previously declared that the statute clearly authorized the action of the Board, now took the opposite view. Although explicitly stating (R. 118) that Congress intended the Act to apply to employees on strike in the circumstances at bar, he considered that to require the reinstatement of such employees would be to compel the employer to make new contracts of employment, and that this would be unconstitutional in the light of the *Adair* and *Coppage* cases

and of the language of this Court in the *Jones & Laughlin* case. Accordingly, he held that the statute "properly construed in the light of the Constitution" did not warrant the Board's order (R. 119). Since Judge Mathews adhered to the views expressed in his former opinion (R. 119), the court again denied the Board's application for enforcement of its order (R. 124).

In a second dissenting opinion (R. 119–123), Judge Garrecht set forth his reasons for disagreeing both with Judge Wilbur and with Judge Mathews.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In not holding that it is an unfair labor practice for an employer, in selecting employees for reinstatement after a strike, to discriminate among them because of their union activities.

2. In not holding that the National Labor Relations Act authorizes the National Labor Relations Board to order that the employees discriminated against should be reinstated.

3. In not holding that persons who have ceased work in consequence of a strike called because of the failure of negotiations concerning wages and conditions of employment are "employees," within the meaning of the National Labor Relations Act.

4. In not holding that a strike called because of the failure of negotiations concerning wages and

conditions of employment is a "current labor dispute," within the meaning of the National Labor Relations Act.

5. In not holding that the Act, construed so as to authorize the Board's order, did not violate the due process clause of the Fifth Amendment.

6. In refusing to enforce the Board's order as valid and supported by the evidence and the findings.

REASONS FOR GRANTING THE WRIT

I. The decision below is in conflict with decisions of the Circuit Courts of Appeals for the Fourth and Fifth Circuits. *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board,* 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 58 S. Ct. 55; *National Labor Relations Board* v. *Bell Oil & Gas Co.,* 91 F. (2d) 509 (C. C. A. 5th).

II. The decision below is also in conflict with a subsequent decision of the Circuit Court of Appeals for the Ninth Circuit, Judges Haney and Stephens concurring and Judge Wilbur dissenting. *National Labor Relations Board* v. *Carlisle Lumber Co.,* decided December 13, 1937.

III. The decision below is erroneous, in the light of the language of the statute and of the decision of this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1.

IV. The question is one of great public importance.

ARGUMENT

I

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH DECISIONS OF THE CIRCUIT COURTS OF APPEALS FOR THE FOURTH AND FIFTH CIRCUITS

The Circuit Courts of Appeals for the Fourth and Fifth Circuits have enforced orders of the Board requiring the reinstatement of employees where (1) the workers in question had voluntarily ceased work in connection with a strike, and (2) the unfair labor practice which was the basis of the Board's order occurred after the strike had begun. *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board,* 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 58 S. Ct. 55; *National Labor Relations Board* v. *Bell Oil & Gas Co.,* 91 F. (2d) 509 (C. C. A. 5th), amended order affirmed and enforced without opinion, October 18, 1937.

In the *Jeffery-De Witt* case, prior to the passage of the National Labor Relations Act the employees of the Insulator Company went out on strike because of failure of negotiations with the employer concerning terms of employment. Subsequent to the effective date of the Act the company refused to bargain collectively with a union duly selected as the representative of the strikers. The Board, finding that this refusal constituted an unfair labor practice, ordered the company to offer reinstatement to those of its employees who were on strike at the time such practice occurred. The company

contended that the strikers were not "employees" within the meaning of the Act. The Circuit Court of Appeals enforced the Board's order *in toto*, and this Court denied certiorari. The Circuit Court of Appeals held (1) that the strikers were "employees" whose work had ceased as a consequence of a "current labor dispute," and (2) that the Act authorized the Board to require the reinstatement of striking employees, although the unfair labor practice occurred after the strike had begun. The decision is thus inconsistent with the views of both Judge Mathews and Judge Wilbur.[2]

The *Bell Oil* case, *supra*, involved precisely the same unfair labor practice occurring in the same circumstances as in the case at bar. There the Board found that the single worker whom it ordered reinstated with back pay had gone out on strike along with a number of others and was subsequently refused reinstatement because of his union activities. The Circuit Court of Appeals for the Fifth Circuit held that the Board's authority had been validly exercised, and enforced the Board's order that he be reinstated because of the unlawful discrimination. 91 F. (2d) at 514. This

[2] The facts of the *Jeffery-De Witt* case presented a more difficult problem than those in the case at bar, since there the employees went on strike *before* the passage of the statute. The discussion in the court's opinion was addressed to this question. If the persons there involved were "employees," *a fortiori* persons striking subsequent to the passage of the Act must be employees.

decision is squarely in conflict with the holding of both Judge Wilbur and Judge Mathews in the instant case.

II

THE DECISION BELOW IS IN CONFLICT WITH A SUBSEQUENT DECISION OF THE SAME COURT

In *National Labor Relations Board* v. *Carlisle Lumber Co.*,[3] decided December 13, 1937, the Circuit Court of Appeals for the Ninth Circuit, Judges Wilbur, Haney, and Stephens sitting, sustained an order of the National Labor Relations Board requiring the reinstatement of strikers. In that case, as in the *Jeffery-De Witt* case, the strike had begun before the effective date of the Act, and the employer had refused to bargain collectively with his striking employees after that date. The strike was called because of the failure of the employer to accept the terms of an agreement proposed by the union. Judges Haney and Stephens held that the strikers came within the statutory definition of "employee," and that the statute, construed so as to authorize an order of reinstatement of such employees, was constitutional. They refused to accept the decision in the *Mackay* case as controlling, pointing out that the "concurring result" of the majority in that case "was reached by entirely different reasoning." Judge Wilbur dissented on the ground that "the Act does not authorize" the rein-

[3] Mimeographed copies of this decision will be filed along with this petition.

statement of striking employees, referring to the views expressed in his second *Mackay* opinion.

In these circumstances, the law in the Ninth Circuit must be deemed unsettled in so far as it relates to the power of the Board to order the reinstatement of striking employees because of unfair labor practices committed against them. The situation here presented is not the common one in which certiorari is sought to review a decision inconsistent with a prior one in the same circuit where there is no reason to suppose that the earlier decision is still law. Here review is sought of the *earlier* decision. The judges who comprised the majority of the court in the *Mackay* case are still on the bench, and did not join in the *Carlisle* decision. The judges who comprised a majority in the *Carlisle* case neither overruled the *Mackay* case nor expressed disapproval of either of the distinct positions taken by Judges Wilbur and Mathews. It is thus impossible to be certain that the various judges in the circuit will not continue to reach inconsistent conclusions on substantially identical facts, thus rendering enforcement of the Act within the circuit dependent upon the fortuitous circumstance of which judges are sitting in a particular case.

If the law of the circuit is not thus unsettled, it can only be because the *Mackay* decision has already been overruled *sub silentio*. If this be the case, the decision ought not to be permitted to stand so long as the time to seek review of the judgment

has not expired;[4] for otherwise the enforcement of the Act would be prevented in a situation where it concededly applies. Not only would the five men immediately involved be deprived of rights to which, by hypothesis, they are entitled, but the cease and desist provisions of the Board's order, which apply in part (Section 1 (b)) to the respondent's nation-wide system of communication, would be nullified.

III

THE DECISION OF THE COURT BELOW IS ERRONEOUS IN THE LIGHT OF THE LANGUAGE OF THE STATUTE AND THE DECISION OF THIS COURT IN *NATIONAL LABOR RELATIONS BOARD* v. *JONES & LAUGHLIN STEEL CORP.*

A. *The Board's action was authorized by the statute.*

The National Labor Relations Act makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization" (Section 8 (3)). In more general terms it also forbids interference with employees in the exercise of their right to form, join, or assist labor organizations and to engage in concerted activities for the purpose of collective bargaining (Sections 8 (1) and (7). The Board is authorized, upon a finding that an employer has engaged in an

[4] Rule 29 of the *Rules of the Circuit Court of Appeals for the Ninth Circuit* requires that petitions for rehearing be filed within 30 days after judgment. The *Carlisle* opinion came down on December 13, 1937, 55 days after the judgment on the rehearing in the *Mackay* case.

unfair labor practice, to require that he "take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." (Section 10 (c)).

In the instant case the Board found that the respondent had intentionally discriminated against five members of the union, including four of its leaders, in refusing to reinstate them after a strike, and had thereby discouraged membership in the ARTA (R. 46–47). The court below did not hold that the Board's findings as to discrimination were not supported by the evidence. They clearly are. Pursuant to the grant of authority in Section 10 (c) the Board ordered the respondent to cease and desist from interfering with its employees in the exercise of their right to self-organization, and to reinstate such employees with back pay (R. 47–48). In *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, at 47, this Court specifically held that the Act authorized the reinstatement of employees discriminated against because of their "union activity." That case is controlling here if the terms "employees" and "reinstatement," as used in the Act, apply to men in the position of the strikers in the case at bar.[5]

[5] That the Act does apply to such persons is indicated by the report of the Committee on Labor of the House of Representatives (H. Rep. 1147, 74th Cong., 1st Sess.). That report describes the conduct prohibited by Section 8 (3) as follows (p. 19):

Judge Mathews was of opinion, however, that the Board's action was not authorized by the statute because the persons reinstated were not "employees" as defined in the Act.[6] The term "employee" is defined in Section 2 (3) to "include any

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"The third unfair labor practice prohibits an employer, by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage membership in any labor organization. * * * This interference may be present in a variety of situations in this connection, such as discrimination in discharge, lay-off, demotion or transfer, hire, forced resignation, or division of work; in *reinstatement or hire following* a technical change in corporate structure, *a strike*, lock-out, temporary lay-off, or a transfer of the plant." [Italics supplied.]

In another part of the Committee Report it is stated that (p. 24):

"The most frequent form of affirmative action required in cases of this type is specifically provided for, i. e., the reinstatement of employees with or without back pay, as the circumstances dictate."

[6] Judge Mathews did not indicate that the Board had failed to make necessary findings, but that the findings and evidence showing the existence of a strike relating to conditions of employment were not sufficient to bring the case within the statute. In its ultimate findings of fact the Board described the persons concerned as *employees;* and its detailed findings of fact demonstrate that these persons had ceased work because of a current labor dispute. There was no specific ultimate finding that the strike was a "current labor dispute." (The Board's findings are in the same form as those upheld in the *Jeffery-De Witt* case; the court there based its decision that the persons involved were "employees," and that there was a "current labor dispute," on the Board's detailed findings of fact.) Respondent did not claim, either before the Board or in the Circuit Court of Appeals, that

individual whose work has ceased as a consequence of, or in connection with, *any current labor dispute.*" It was Judge Mathews' position that "the evidence * * * does not show that there was any current labor dispute" (R. 90), and that accordingly the persons discriminated against by respondent were not employees within the meaning of the Act.

Judge Mathews' opinion states that the strike was called "because, as stated by the Board in its findings of fact, the negotiators representing the association 'decided that a strike was advisable in view of the unsatisfactory state of the negotiations' " (R. 90). The subject of the negotiations was an agreement concerning wages and conditions of employment (R. 20–21). It is difficult to imagine—even apart from the definition in Section 2 (9) of the Act—what a labor dispute can be if it does not include a strike as to wages and conditions of employment. But in any event the question is settled conclusively by Section 2 (9), which defines "labor dispute" so as to include "any controversy concerning terms, tenure, or conditions of employment."

These statutory provisions indicate clearly (1) that a strike concerning terms of employment is a

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the strike was not a current labor dispute, and it was not doubted by anyone—until Judge Mathews' opinion came down—that the dispute fell within the statutory definition.

current labor dispute, and (2) that the persons engaged in such a strike are employees within the meaning of the Act. The statute has been so construed by the Fourth Circuit in the *Jeffery-De Witt* case, by the Fifth Circuit in the *Bell Oil & Gas* case, by Judges Haney and Stephens in the *Carlisle* case in the Ninth Circuit, and by Judges Garrecht and Wilbur in this case. Judge Mathews' ruling that a strike called because of failure to agree on terms of employment is not a "current labor dispute" is obviously erroneous—both on its face and in the light of the definition of "labor dispute" in Section 2 (9) of the Act.

In his second opinion Judge Wilbur did not deny that the strikers were employees within the meaning of the Act. But his view was that to compel their *reinstatement,* when the unfair labor practice had occurred while they were on strike, would be to compel the employer to enter into a new contract of employment, and that this could not be done consistently with the Fifth Amendment. In order to avoid a construction of the Act which would authorize what he considered an unconstitutional order, he construed the word "reinstatement" in Section 10 (c) as not meaning reinstatement to a position of employment, which is obviously what it was intended to mean, but reinstatement to one's status at the time of the unfair labor practice, which in the case of a practice occurring after a strike had

begun would mean reinstatement to a position as a striker. This construction, patently artificial, is inconsistent with the action of the courts in the *Jeffery-De Witt, Bell Oil & Gas,* and *Carlisle* cases, in each of which reinstatement to a position of employment was ordered although the unfair labor practice occurred after the strike had begun.

Even if this construction of the word "reinstatement" as used in Section 10 (c) were tenable, it would only apply to the affirmative portion of the Board's order requiring reinstatement of the five employees. It would not affect the other provisions of the order directing respondent to cease and desist from interfering with its employees' right to self-organization, since these provisions are in no way dependent upon the Board's power of reinstatement. And yet on the basis of his reasoning with respect to the meaning of "reinstatement", Judge Wilbur denied *in toto* the Board's application for enforcement of its order. This result was clearly erroneous; it does not even find support in Judge Wilbur's own reasoning.

B. *The Act, construed so as to authorize the Board's order, is constitutional.*

The basis of Judge Wilbur's opinion was his belief that to require the reinstatement of striking employees to their former positions would be to compel the employer to make a new contract, and that the Fifth Amendment stood in the way of any such requirement. His premise was that the order

required the making of a new contract—that the striking employee (although an "employee" within the statutory definition) stood in the same position as a man who had never been employed by the respondent, and that reinstatement of the former was the equivalent of giving employment to the latter.

The first answer to this argument is that the premise is false. Many cases indicate that at common law, entirely apart from the definition in the National Labor Relations Act, the employment relationship is not terminated by the act of the employees in going on strike.[7] These cases were reviewed at length by the Circuit Court of Appeals for the Fourth Circuit in the *Jeffery-De Witt* case, and that court concluded that

> Irrespective of the statute, therefore, the strike did not of itself result in a complete severance of the relationship which had been established between the company and its employees. *They were employees on*

[7] *Jeffery-De Witt Insulator Co.* v. *National Labor Relations Board, supra; National Labor Relations Board* v. *Carlisle Lumber Co., supra; Michaelson* v. *United States*, 291 Fed. 940, 942 (C. C. A. 7th), reversed on other grounds, 266 U. S. 42; *Iron Moulders' Union* v. *Allis-Chalmers Co.*, 166 Fed. 45, 52 (C. C. A. 7th); *Dail-Overland Co.* v. *Willys-Overland Co.*, 263 Fed. 171, 187, aff'd, 274 Fed. 56, 65 (C. C. A. 6th); *Fryns* v. *Fair Lawn Fur Dressing Co.*, 114 N. J. Eq. 462, 168 Atl. 862, 865; *State* v. *Personett*, 114 Kan. 680, 220 Pac. 520, 524; *Uden* v. *Schaeffer*, 110 Wash. 391, 188 Pac. 395; *Greenfield* v. *Central Labor Council*, 104 Ore. 236, 192 Pac. 783, 787.

> *strike because of the labor dispute which existed* * * * (91 F. (2d) at 138). [Italics supplied.]

Judges Haney and Stephens of the Ninth Circuit were of the same opinion. *National Labor Relations Board* v. *Carlisle Lumber Co., supra.* If the employment relation is not terminated by the strike, the employer is not required to enter into a new contract of employment by the order of reinstatement. Such an order merely directs that a relationship which has not been completely severed be actively resumed.

The inclusion of men on strike within the statutory definition of "employee" (see p. 3, *supra*) thus adopts the rule of the common law. But even if the statute were at variance with the common law doctrine it would not, of course, follow that the statute was unconsitutional. For in the exercise of its power over interstate and foreign commerce, Congress may regulate contractual relationships as long as the regulation is not arbitrary or capricious. Congress may regulate the incidents of the contract of employment in order to safeguard interstate commerce from industrial strife, even if in doing so freedom of contract is to some extent restricted. If the restrictions here imposed upon the employer's right to discriminate in reinstating strikers can reasonably be regarded as carrying out the legitimate purposes of the Act, they are valid.

In the *Jones & Laughlin* case this Court sustained the Act in so far as it imposed a restriction upon the employer's freedom to *discharge* his employees for "union activity" or "for the purpose of discouraging membership in the union" (301 U. S. at 47). The Court there upheld an order of the Board that discharged employees be reinstated with back pay, on the ground that it was a proper sanction for the enforcement of a valid regulation. 301 U. S. at 48. This order interfered with the freedom of contract which the employer would have enjoyed apart from the statute. In the instant case the question relates to the same restraint, except that the employer's discrimination in *selecting* employees to return to work after a strike is involved. Such discrimination is equally capable of being used as a means of interfering with the employees' right of self-organization (see pp. 24–25, *infra*). If it be assumed that such persons are no longer employees, the statute would then be regarded as restricting the employer's right of selection rather than his right of discharge. But the purpose and effect of the regulations are the same, and there is no reason why one should be held to be a valid limitation upon freedom of contract and the other not. The opinion in the *Jones & Laughlin* case indicates that the Court did not regard the difference as material. The Court there stated (301 U. S. at 45–46):

> The Act does not interfere with the normal exercise of the right of the employer *to*

> *select* its employees or to discharge them. * * * It would seem that when employers freely recognize the right of their employees to their own reorganizations and their unrestricted right of representation there will be much less occasion for controversy in respect to the free and appropriate exercise of the *right of selection* and discharge. [Italics supplied.]

IV

THE QUESTION PRESENTED IS OF GREAT PUBLIC IMPORTANCE

This case raises important questions with respect to the construction and constitutionality of the National Labor Relations Act. The basis of the Act is the judgment of Congress, confirmed by experience, that recognition of the employees' right to bargain collectively through representatives of their own choosing without interference by the employer, will lessen industrial strife. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., supra,* at 42. If the employer is permitted to discriminate, either in selection or discharge, against persons who are active members of labor organizations, the employees will not feel free to choose their own representatives. Many employees would be afraid to participate in union activities if in the event of a strike the employer could discriminate against them for that reason alone. An employer seeking to break up a union could easily provoke a strike, by methods perhaps not in them-

selves illegal—such as the establishment of wages or working conditions clearly unacceptable to the employees—and then refuse to reinstate the leaders of the union. The mere possibility of such conduct on the part of the employer would prevent many employees from freely joining labor organizations to which the employer might be opposed.

The Board's experience demonstrates that discrimination of the kind here involved is not infrequent.[8] Such conduct would undoubtedly become much more frequent if it were held not to violate the Act. In the light of these facts the present National Labor Relations Board,[9] as well

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[8] See *First* and *Second Annual Reports of the National Labor Relations Board*; at pp. 81–83, and 76–78, respectively, and the following cases: *In the Matter of United Aircraft Manufacturing Co.*, 1 N. L. R. B. 236; *In the Matter of The Timken Silent Automatic Co.*, 1 N. L. R. B. 335; *In the Matter of Canvas Glove Manufacturing Works, Inc.*, 1 N. L. R. B. 519; *In the Matter of Sunshine Hosiery Mills*, 1 N. L. R. B. 664; *In the Matter of Segall-Maigen Co.*, 1 N. L. R. B. 749; *In the Matter of Columbia Radiator Co.*, 1 N. L. R. B. 847; *In the Matter of Alabama Mills, Inc.*, 2 N. L. R. B. 20; *In the Matter of Mackay Radio & Telegraph Co.*, 2 N. L. R. B. 500; *In the Matter of Clark & Reid Co., Inc., and Curtis & Croston, Inc.*, 2 N. L. R. B. 516; *In the Matter of Remington Rand, Inc.*, 2 N. L. R. B. 626; *In the Matter of Lion Shoe Co.*, 2 N. L. R. B. 819; *In the Matter of Elbe File & Binder Co.*, 2 N. L. R. B. 906; *In the Matter of Black Diamond Steamship Corp.*, 3 N. L. R. B., No. 8; *In the Matter of Maryland Distillery Co., Inc.*, 3 N. L. R. B., No. 16; *In the Matter of Kentucky Firebrick Co.*, 3 N. L. R. B., No. 46; *In the Matter of Highway Trailer Co.*, 3 N. L. R. B., No. 65; *In the Matter of Wald Transfer & Storage Co., Inc.*, 3 N. L. R. B., No. 72.

[9] *Ibid.*

as its predecessors established under the National Industrial Recovery Act [10] and Public Resolution No. 44, 74th Cong., 1st Sess.,[11] have uniformly ruled that discrimination in reinstatement of striking employees must be remedied by restoring the victims to their jobs.

The decision of the court below that it is beyond the power of the Board to require the reinstatement of strikers is, in the words of the dissenting judge, "a strained construction designed to nullify the National Labor Relations Act in an important field of its operations." (R. 122.) By validating discrimination in the reinstatement and hire of workers it permits interference with the rights of self-organization and collective bargaining guaran-

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[10] See, *e. g.*, *In the Matter of General Baking Co.* and *Bakery Wagon Drivers, Chauffeurs and Helpers Union, Local #463*, decided Jan. 4, 1934, Decisions of the National Labor Board, Part I, p. 32; *In the Matter of Finck Cigar Co.* and *Cigar Makers' International Union of America*, decided May 12, 1934, *Ibid.*, Part II, p. 26; *In the Matter of Eagle Rubber Co.* and *United Rubber Workers Federal Labor Union #18683*, decided May 16, 1934, *Ibid.*, Part II, p. 31.

[11] *In the Matter of K. O. Lee & Son Co.* and *Hans Christianson, Milton Frantz, James P. Davies*, decided Sept. 8, 1934, Decisions of the (old) National Labor Relations Board, Vol. I, p. 59; *In the Matter of International Furniture Co.* and *Upholsterers, Carpet and Linoleum Mechanics International Union*, decided Sept. 11, 1934, *Ibid.*, Vol. I, p. 63; *In the Matter of North Carolina Granite Corp.* and *Granite Cutters International Ass'n Mt. Airy Branch*, decided Sept. 24, 1934, *Ibid.*, Vol. I, p. 89.

teed in the Act and thereby fosters the industrial unrest found by Congress to result from such interference (Section 1).

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Ninth Circuit should be granted.

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